U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: MAY 07 2013 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a physician. At the time she filed the petition, the petitioner was training in an infectious disease fellowship at Pennsylvania. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a three-paragraph statement.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by

increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on June 28, 2011. In an accompanying statement, counsel stated that the petitioner "has been consistently recognized by top experts in the field. . . . The world's leading experts acknowledge her unparalleled expertise in INFECTIOUS DISEASES care."

The initial filing included the petitioner's 33-page *curriculum vitae*, in which she identified two poster presentations and 23 oral presentations, and discussed projects for which manuscripts were in preparation, but she did not claim to have published any articles. Likewise, counsel's introductory

statement did not indicate that the petitioner had written any published articles. The petitioner submitted copies of articles by other researchers, as background evidence, but did not submit any of her own articles. There is every indication, therefore, that the petitioner had not published any articles as of the petition's filing date.

The petitioner asserted that there is a "severe national shortage" of primary care physicians. Section 203(b)(2)(B)(ii) of the Act allows certain physicians in shortage areas to qualify for the national interest waiver, provided that they meet conditions specified in the statute and in USCIS regulations at 8 C.F.R. § 204.12. The petitioner made no attempt to meet those conditions. The bare assertion that a physician shortage exists cannot meet the identified statutory and regulatory requirements.

Counsel asserted: "Labor certification prohibits a job offer that includes a combination of occupations. See 69 Fed Reg 247 at 77394." The cited entry in the Federal Register promulgated a final rule issuing new Department of Labor (DOL) regulations governing labor certification. The relevant regulation does not match counsel's description. Specifically, the regulation at 20 C.F.R. § 656.17(h)(3), which appears on the cited page of the Federal Register, reads:

> If the job opportunity involves a combination of occupations, the employer must document that it has normally employed persons for that combination of occupations, and/or workers customarily perform the combination of occupations in the area of intended employment, and/or the combination job opportunity is based on a business necessity. Combination occupations can be documented by position descriptions and relevant payroll records, and/or letters from other employers stating their workers normally perform the combination of occupations in the area of intended employment, and/or documentation that the combination occupation arises from a business necessity.

The quoted regulation does not state, as counsel claimed, that "[l]abor certification prohibits a job offer that includes a combination of occupations." Rather, combination occupations are acceptable, provided the employer is able to meet one of the specified conditions. Counsel's assertion that physicians do not routinely engage in teaching or research does not take into account the faculty of medical schools, for whom such duties would appear to be routine.

The petitioner submitted a letter from Dr. associate professor at Pennsylvania, who stated that the petitioner "is one of a select group of extraordinary infectious disease specialists" who "is consistently recognized for her expertise." Dr. did not elaborate, except to claim that "[o]nly the best physicians are selected" for positions at the hospitals where the petitioner has worked, and that "[o]nly leading physicians have the privilege of serving as a peer reviewer for so many renowned journals." (Dr. named 13 such journals.)

Evidence of the petitioner's peer review work included an electronic mail message from editor in chief at with the title: "Interested in being a peer-reviewer for . The body of the message read: "SIGNUP TO JOIN OUR PEER-REVIEW COMMUNITY. If you haven't already done so you can now apply to be one of our

volunteer peer-reviewers." An invitation to submit an application is not evidence that the petitioner had, in fact, served as a peer reviewer for that publisher.

Messages from other publishers confirmed that the petitioner had registered for "online submission and peer review tracking system[s]" for various publications. Ten of the messages are dated January 24, 2011; seven of those originated within a 26-minute period between 8:12 p.m. and 8:36 p.m. The submitted evidence does not indicate that any of the publications consider participation in peer review to be a "privilege" as claimed.

Other witnesses, most of them in Pennsylvania and most of them at institutions where the petitioner has worked or studied, made similar claims that the petitioner is a nationally recognized figure in medicine. Several witnesses credited her with significant contributions, but did not identify those contributions except to describe the petitioner's handling of individual medical cases.

On April 20, 2012, the director issued a request for evidence. The director found that the petitioner had met only the first two prongs (regarding intrinsic merit and national scope) of the three-pronged *NYSDOT* national interest test. The director quoted from the witness letters, and found that they "are vague and give very little detail about how the petitioner's work and expertise has made an impact to the field of Infectious Diseases as a whole on the national level." The director stated: "there is no evidence to establish prior achievements in the field as a whole."

In response, counsel stated that the petitioner had submitted "[t]estimonials from renowned experts, who are considered the foremost leaders in their fields." The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel stated that the petitioner's "research work was selected for publication and presentation in some of the leading institutions in her field." The initial submission contained no evidence that the petitioner's work had been "selected for publication," and the petitioner submitted no new evidence to that effect in response to the request for evidence.

Dr. medical director of the stated that the petitioner's "research on has won the first prize for the clinical research this year." Dr. did not identify the prize, but the record contains a photocopied certificate that reads:

The record does not establish the significance of this prize, which appears to be limited to employees of The date on the certificate is May 23, 2012, nearly a year after the petition's June 28, 2011 filing date. Even if the petitioner had established the significance of this award from her employer, it cannot retroactively establish that the petitioner was eligible for the waiver at the time she filed the petition. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request. 8 C.F.R. § 103.2(b)(1). Therefore, subsequent events cannot cause a previously ineligible alien to become eligible after the filing date. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

Dr. also contended that the petitioner "is recognized throughout the medical community for her excellent skills and for the advances she has made with her original research projects implemented by other physicians." Dr. did not elaborate on this point, but stated: "In my opinion, these accomplishments alone place [the petitioner] well into the top ranks of infectious disease specialists." The record offers little basis for an objective comparison between the petitioner and "the top ranks of infectious disease specialists."

The Board of Immigration Appeals (BIA) has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The BIA also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

The opinions of experts in the field are not without weight and the AAO has considered them above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as above, evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795.

In this instance, Dr. offered vague claims about the petitioner's standing in her field with no supporting evidence or explanation. It cannot suffice simply to assert that the petitioner "is recognized throughout the medical community"; the record does not show that Dr. speaks for "the medical community."

The petitioner submitted documentation of her ongoing professional activity, including printouts from electronic slide presentations and information about conferences that occurred after the petition's filing date. The petitioner submitted no objective evidence to establish that these activities, or the ones she

undertook before the filing date, warrant the claim that the petitioner is among "the top ranks of infectious disease specialists." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The petitioner documented several job offers, all dating from mid-2012, well after the filing date. The petitioner did not establish that any of the offered positions would involve teaching or research. This is a significant omission, because counsel based the waiver application in large part on the claim that the combination of teaching, research, and clinical practice made the petitioner ill-suited for labor certification. Such strictures would not apply to a solely clinical position.

The director denied the petition on September 25, 2012. The director described the petitioner's response to the request for evidence, and stated that the petitioner had not established the significance of her past work. The director acknowledged the evidence of the petitioner's participation in the peer review process, but stated that "[r]eviewing the work of others is routine in the field," and is not evidence of "a track record of influence in the field."

The appellate statement repeats the claim that "the Department of Labor does not allow for a combination of occupations when filing a labor certification." As noted previously, the Department of Labor regulation at 20 C.F.R. § 656.17(h)(3) permits "a combination of occupations" if "the employer . . . has normally employed persons for that combination of occupations, and/or workers customarily perform the combination of occupations in the area of intended employment, and/or the combination job opportunity is based on a business necessity." The Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) states: "Physicians examine patients, take medical histories, prescribe medications, and order, perform, and interpret diagnostic tests,"[1] but that discussion refers to physicians in a strictly clinical setting. The petitioner's career, as documented in the record, has not been that of a physician in a strictly clinical setting. Rather, she has been a trainee at a teaching hospital, where research and teaching duties appear to be routine rather than exceptional.

With respect to the petitioner's teaching duties at the appellate statement indicates that the petitioner "is constantly teaching the use of the skills to both junior and senior peers, as such creating a ripple effect that is making the performance of these procedures more widespread nationally." The appellate statement does not identify "the procedures." There is no indication that the petitioner herself developed or substantially improved any medical procedures. Rather, she learned them from others and, in turn, passed them on to medical students. This appears to be standard practice in medical education, rather than a unique accomplishment that distinguishes the petitioner from other physicians who, in advanced stages of their own training, provide instruction to newer medical students.

The appellate statement repeats the claim that the petitioner's "research work was selected for publication," a claim that the petitioner has never substantiated. As noted previously, the petitioner's

[1] http://www.bls.gov/ooh/healthcare/physicians-and-surgeons.htm (printout added to record May 2, 2013).

initial submission detailed her past work at length but did not indicate that any journal had published her work or accepted it for publication.

The appellate statement notes that the petitioner "has also been selected as a peer-reviewer for renowned journals." The petitioner has not established that participation in peer review is reserved for influential or recognized figures in her field.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. There is no blanket waiver for physician/researchers, or for physicians who also have teaching duties. There are statutory and regulatory provisions for physicians in shortage areas, but the petitioner has not attempted to satisfy the requirements of those provisions. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.